(3)

90-488
NO. ____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

MICHAEL ARVIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR PETITIONER IN RESPONSE TO OPPOSITION BRIEF OF UNITED STATES

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Ferber-Related Analysis

The government argues that an obscenity-related inquiry into "community standards," "prurient interest," and "significant value" is not required and

is not supported by an Appeals Court opinion. This is misleading as to petitioner's actual arguments and is inaccurate as to the common law.

Petitioner Arvin has not argued for an obscenity-related inquiry but rather he has asked for his right to submit evidence in accord with the Ferber analysis. Pet 19-23. The Ninth Circuit in Wiegand stated that terms such as "lewd" and "lascivious" are deeply rooted in "community standards." The court went on to agree that these terms are the result of norms which do vary over time and space with "the law's embodiment in the contemporary customs and conventions of a community. . ." United States v. Wiegand, 812 F.2d 1239, 1244 (9th Cir.), cert. denied, 484 U.S. 856 (1987).

Expert Testimony

The government argues the propriety of adducing expert testimony is to be determined by the assistance it will provide to the trier of fact. G.B. 7. In citing Hamling v. United States, 418 U.S. 87 (1984), et al., the government attempts to foreclose petitioner's claim that the District Court was in error in excluding expert testimony.

Hamling says in part, "[a]s we have noted, infra, at 124-125, the District Court has wide discretion in its determination to admit and exclude evidence, and this is particularly true in the case of expert testimony." Id. at 108.

But Hamling is a double-edged sword. For though it straps petitioner to "the laboring oar in showing that such rulings constitute reversible error" (id. at

124), it also provides petitioner with his argument of the propriety of the expert testimony.

In Hamling, "the District Court permitted four expert witnesses called by petitioners to testify extensively concerning relevant community standards." Id. at 125.

The Court of Appeals in the Hamling case had concluded that the District Court's exclusion of comparable material was correct and "that any abuse of discretion in refusing to admit the materials themselves had been 'cured by the District Court's offer to entertain expert testimony . . . ." Id. at 125, quoting 481 F.2d at 320.

In the instant case, petitioner's offer of comparable materials was rejected without the curative offer to entertain any expert testimony. And as

has been previously established, petitioner was also denied competent testimony as to the essential element of "engaging in." Here petitioner was given no latitude in rebutting factual issues and no opportunity of "contradiction by countervailing evidence." Id. at 110 n.11.

Even the government has conceded that "the statutory element that the minor be depicted 'engaging in sexually explicit conduct' . . . required the jury to find that the pictures showed a minor engaging in such conduct." G.B. 8. As petitioner was able to raise a prima facie showing as to materiality of at least this issue, Hamling underscores petitioner's right to expert testimony. "The defendant in an obscenity prosecution, just as a defendant in any other prosecution, is entitled to an oppor-

tunity to adduce relevant, competent evidence bearing on the issues to be tried." Id. at 125.

Jury Instructions

The District Court instructed the jury that the offense consisted of four elements: (1) a knowing mailing; (2) a visual depiction; (3) the use of a minor; and (4) lascivious exhibition of the genitals or pubic area. Pet. App. 28A n.4. Only one of these elements, i.e., the use of a minor, was left solely for the jury to decide. Jury deliberation upon each of the other three elements was at least in part usurped by the District Court. Pet. App. 28A-29A.

The District Court informed the jury that as the mailing was admitted, "there's . . . no necessity for you to

make a decision on that."[1] Ibid.

As to the visual depiction, the District Court told the jury, "[t]he pictures in this case are obviously visual depictions." Ibid.

The fourth element, the lascivious exhibition of the genitals, was divided as to presumptiveness. The jury was told it was obvious that these pictures involved the genitals and pubic area, but that the jury would have to wrestle with whether in fact the exhibitions were lascivious or not. Ibid.

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[1] Petitioner concedes that this instruction, as to knowing mailing, was harmless error. It was ". . . an instruction establishing a conclusive presumption with regard to an element of the crime that the defendant in any case admitted." Carella v. California, 488 U.S. ___, ___ (1989), Scalia, J. concurring and citing Connecticut v. Johnson, 460 U.S. 73, 87 (1983) (plurality opinion).

The basis of the government's argument is that this type of error does not rise to the level of plain error. G.B. 8-9. It claims that these were not issues in dispute;[2] that petitioner had admitted the mailing; that the evidence was admitted; that the evidence spoke for itself; and that no jury examining the pictures could have concluded otherwise. Ibid.

The government argued that at any rate the question of lasciviousness, being the only issue in dispute, was left to the jury to decide. Ibid. However, the District Court's prior presumptions as to the elements, particularly the fourth, tainted the factors to be used in

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[2] Not only had petitioner disputed the genital exhibition element, but he had planned to introduce expert testimony and evidence as to this issue. Pet. 13-23.

determining lasciviousness. The District Court told the jury that "when you see the photographs, it is obvious that they do involve the genitals and pubic area." Pet. App. 28A-29A. This instruction was a conclusive presumption. A reasonable juror would have interpreted this as a mandatory inference to be drawn when considering the first of the eight lasciviousness factors, i.e., "whether the focal point of the pictures is on the child's genitals or pubic area." Ibid.

The District Court's observation here did amount to plain error. It has been shown, supra, that it played a role in influencing the jury's deliberation as to lasciviousness and therefore as to its verdict.

As this Court has pointed out in Cupp, "the question is not whether the trial court failed to isolate and cure a

particular ailing instruction, but rather whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Cupp v. Naughton, 414 U.S. 141, 147 (1973).

Conclusion

For all of the reasons stated above, as well as those set forth in the Petition for Writ of Certiorari, it is respectfully asked that a writ of certiorari be issued to the United States Circuit Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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